82-1262

No. ———

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LUTHER ALBERT JAMES - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

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QUESTIONS PRESENTED

1. Was there insufficient evidence to sustain conviction under Title 18, United States Code, Section 1955, where the entire record presents no evidence whatsoever that the petitioner participated in or knew about the illegal gambling business the subject of the indictment?

2. Was the petitioner denied due process of law when he was convicted of violation of Title 18, United States Code, Section 1955, based upon a record lacking any relevant evidence as to a crucial element of the offense, namely evidence of the petitioner's participation in the illegal gambling business the subject of the indictment?

3. Was the petitioner entitled to have the jury determine, under proper instructions, whether petitioner knowingly participated in the alleged illegal gambling business?

4. Is it contrary to public policy and law to impose criminal liability upon a corporate shareholder and officer not shown to have participated in illegal acts committed by others in the corporation or by the corporation itself?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. _____

LUTHER ALBERT JAMES - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

The petitioner Luther Albert James respectfully prays that a writ of certiorari be issued to review the order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 10, 1982, affirming the petitioner's judgment of conviction and sentence for violation of Title 18, United States Code, Section 1955.

OPINION BELOW

The order of the Court of Appeals, not reported, affirming the petitioner's judgment of conviction upon a jury verdict was entered and filed on November 10, 1982, and appears in the appendix hereto. No written opinion was rendered by the Court of Appeals or by the District Court for the Western District of Kentucky.

JURISDICTION

The order of the Court of Appeals for the Sixth Circuit affirming the petitioner's judgment of conviction and sentence was entered and filed on November 10, 1982. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on January 4, 1983, and this petition for certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under the provisions of Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions:

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

Statutory Provisions:

Title 18, United States Code, Section 1955 provides in pertinent part as follows:

> §1955. *Prohibition of illegal gambling businesses*
>
> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

Rules:

Federal Rule of Criminal Procedure 16(a)(1)(A) provides in pertinent part as follows:

> (A) *Statement of Defendant.* Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; *the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent;* and recorded testimony of the defendant before a grand jury which relates to the offense charged. [Emphasis supplied]

STATEMENT OF THE CASE

In December of 1980, the Grand Jury for the Western District of Kentucky returned a two-count indictment against the petitioner Luther Albert James, count one of which charged him with a single violation of the provisions of Title 18, United States Code, Section 1955 (pertaining to prohibition of illegal gambling businesses), and count two of which charged him with a single violation of the provisions of Title 18, United States Code, Section 1952 (the Travel Act).

The petitioner was brought to trial on both counts of the indictment and, at the conclusion of the govment's case in chief, the district court granted the petitioner's motion for a judgment of acquittal as to count two of the indictment charging him with violation of the Travel Act, but denied his motion for judgment of acquittal with respect to count one of the indictment, charging him with violation of Section 1955.

The petitioner presented evidence and, at the close of all the evidence, moved for a judgment of acquittal as to count one of the indictment, which was again denied.

Count one of the indictment charged as follows:

> From on or about the first day of November, 1979, and continuously thereafter up to and including the 21st day of May, 1980, in the Western District of Kentucky, LUTHER ALBERT JAMES did unlawfully, willfully, and knowingly conduct, finance, manage, supervise, direct, and own an illegal gambling business involving the maintenance and operation of electronic video-display gambling devices in violation of the laws of the Commonwealth of Kentucky . . . , in which said business was conducted. . . . [Indictment, Count One]

Over the objection of the petitioner, the court instructed the jury as follows:

> Section 1955 of Title 18 of the United States Code provides in part that (a) *Whoever* conducts, finances, manages, supervises, directs or *owns all*

> *or part of an illegal gambling business shall be guilty* of an offense against the United States. [Emphasis added] [District Court's Instructions]

The district court further instructed the jury, over the petitioner's objection, that:

> [I]n order to find the defendant guilty under Title 18 U. S. Code Section 1955, you must find that he conducted, financed, managed, supervised or owned all or part of an illegal gambling business which was in violation of a state law. [District Court's Instructions]

The district court refused an instruction tendered by the petitioner, which reflected the actual circumstances and central issue in the case, as follows:

> In order for you to find the defendant guilty, you must find beyond a reasonable doubt that the defendant was involved in the alleged gambling business to such an extent that he knowingly, personally and substantially contributed to the success of the alleged gambling business. [Defendant's Request to Charge]

The jury returned a verdict of guilty as to count one of the indictment and the district court, after denying the petitioner's timely motions for a judgment of acquittal after discharge of the jury and for a new trial, entered a judgment of conviction upon the jury's verdict, and sentenced the petitioner to the custody of the Attorney General for a period of two years, and to pay a fine of $20,000.00. The petitioner timely appealed to the Court of Appeals for the Sixth Circuit.

At oral argument, the presiding judge of the panel of the Court of Appeals, pursuant to Sixth Circuit Rule 19, announced that the decision of the panel was unanimous as to affirmance of the conviction, that no jurisprudential purpose would be served by the issuance of a written opinion and that, accordingly, the judgment of the district court would be affirmed. An order in accordance therewith was filed November 10, 1982.

Viewed in the light most favorable to the government, the evidence, taken as a whole, shows that from on or about November 1, 1979, through on or about May 21, 1980, an "illegal gambling business", as defined in Title 18, United States Code, Section 1955, involving the maintenance and operation of approximately fourteen (14) electronic video-display poker machines was carried on in Jefferson County, Kentucky, within the Western District of Kentucky. The "illegal gambling business" was amorphous in form, in that the "business" was not alleged by the government or shown by the evidence to be any single organized business enterprise such as a corporation, but consisted instead of an assortment of owners and bartenders of approximately twelve (12) Louisville-area taverns operating in conjunction with employees of a vending machine company which had placed the electronic video-display poker machines in the taverns, and which split the proceeds of play on the machines fifty-fifty with each tavern operator.

The gambling aspect of the business consisted in owners or bartenders of taverns making payoffs to

players of the machines at the rate of 25 cents per accumulated point as shown on the machines, in lieu of the player "playing off" those points as free games.

The machines themselves were not *per se* gambling devices under either Kentucky or federal law. However, there is no question that they were used for the purpose of gambling in violation of the Kentucky Revised Statutes, and there is likewise no question that the alleged "illegal gambling business," taken as a whole, involved more than five persons and was in substantially continuous operation for a period in excess of thirty days.

The vending machine company which owned the electronic video-display poker machines was a Kentucky corporation known as "James Vending Corp.". That corporation was formed and commenced doing business in 1972, and by the time of the return of the indictment in 1980, was engaged in operating some three hundred, fifty-nine (359) separate vending and amusement machines, all of which—with the exception of the fourteen (14) electronic video-display poker machines the subject of the indictment—were in every respect lawful to own and were lawfully operated and which had nothing to do with gambling or any other unlawful activity. The corporation's gross receipts from its share of the proceeds of operation of the fourteen electronic video-display poker machines, which were used for gambling purposes, amount to approximately 1.5 percent (1.5%) of the corporation's gross receipts from all sources during the time period charged

in the indictment (that is, approximately $3,290.00 out of gross receipts of approximately $211,774.00).

The petitioner Luther Albert James was, from the inception of James Vending Corp., its President, a director of the corporation and the owner of forty percent (40%) of its outstanding shares of common capital stock. However, the petitioner never personally operated the business of the corporation, but instead held his stock in the corporation as an investment, the corporation continuously employing a "manager" or "general manager", who was in charge of all day-to-day operations of the corporation, including, but not limited to, purchasing machines, servicing them, collecting proceeds from the machines, dividing those proceeds with the owners of premises where the machines were placed on location and banking the corporation's share of the proceeds. Viewed in the light most favorable to the government, the evidence shows that the "manager" ran the corporation independently of, and without direction from, the petitioner.

Viewed in the light most favorable to the government, all of the evidence, including all of the evidence and testimony presented by and through the government's witnesses, shows beyond a reasonable doubt that James Vending Corp.'s manager during the time period of the indictment, one John "Dude" Koerner, was the person who caused James Vending Corp. and some of its employees (other than the petitioner) to become involved in the "illegal gambling business" alleged in the indictment. Koerner ordered all of the electronic video-display poker machines; caused the

corporation to pay for them; caused a device known as a "knock-off switch" to be installed on each of the fourteen (14) machines the subject of the indictment by employees (other than the petitioner) of James Vending Corp., such knock-off switches later being used by owners and bartenders of taverns in which the machines were placed to run off accumulated free game points from the machines; caused the machines to be placed on location in the various taverns; was, together with the owners and bartenders of the taverns in which the machines were placed, responsible for payoffs at the rate of 25 cents per free game point being paid to players on the machines; and, together with other employees of James Vending Corp. (other than the petitioner), was the person who serviced the machines and who caused to be paid out to tavern owners where the machines were located one-half of the gross receipts taken in by the machines. It should be noted that the machines themselves are not physically capable of paying out money or any other thing of value directly to a successful player, and are thus unlike slot machines.

Viewed in the light most favorable to the government, none of the evidence suggests in any way that the petitioner had anything whatsoever to do with conducting, financing, managing, supervising or directing all or any part of the alleged illegal gambling business the subject of the indictment.

Viewed in the light most favorable to the government, all of the evidence shows that the petitioner owned forty percent (40%) of the capital stock of James Vending Corp., which corporation, through

Koerner and several other employees of the corporation (other than the petitioner), was a participant in the alleged illegal gambling business the subject of the indictment.

Over the objection of the petitioner, four (4) law enforcement officers were allowed to testify as a part of the government's case in chief as to the substance of statements made by the petitioner to those law enforcement officers during a raid, which occurred after the conclusion of the time period charged in the indictment, the purpose was the seizure of the electronic video-display poker machines. The basis of the petitioner's objection to their testimony being introduced was that the petitioner had requested discovery of the substance of any oral statement which the government intended to offer in evidence at the trial, made by the petitioner whether before or after arrest in response to interrogation by any person then known to the petitioner to be a government agent, as permitted under F.R. Crim. P. 16(a)(1)(A). The petitioner's request for such discovery was made long prior to trial, and was continuing in nature. At no time up until the testimony was being elicited at trial by the attorney for the government was the petitioner or his counsel furnished with discovery of such statements allegedly made by the petitioner, even though, by the exercise by reasonable diligence, such statements should have been well known to the attorney for the government.

It is inferable from the statements allegedly made by the petitioner, as testified to by the four law enforcement officers at the time of the trial, that the petitioner

had knowledge of the existence of some of the electronic video-display poker machines, and had knowledge that they were owned by James Vending Corp.. However, there is no evidence from which any inference can possibly be drawn that petitioner had any knowledge of the existence of the illegal gambling business or that the machines were being used for gambling purposes. While the members of the panel of the Court of Appeals correctly remarked, at oral orgument, that those statements of the petitioner did not tend to show his guilt of the charge contained in count one of the indictment, the introduction of those statements was nevertheless highly prejudicial to the petitioner in the eye of the jury, in that it tended to link the petitioner to the operation of the alleged illegal gambling business.

Finally, evidence was elicited as a part of the government's case in chief from an employee of James Vending Corp., one Elwood Roe, which was extremely misleading to the jury, the district court, and the Court of Appeals. Mr. Roe testified that everything he did in connection with the operation of the electronic video-display poker machines was done at the behest of John "Dude" Koerner. The witness was then asked by the attorney for the government whether he had previously testified before the grand jury, to which he responded affirmatively, followed by which the attorney for the government read him a portion of his grand jury testimony consisting of his affirmative answer to a leading question asked by the attorney for the government conducting the grand jury proceedings, *which leading*

question (as contrasted with Roe's answer to it) was capable of being interpreted as indicating that the petitioner had knowledge of the existence and operation of the alleged illegal gambling business.

It appears, from all of the evidence, from the instructions and from the record taken as a whole that the petitioner was convicted of violation of Section 1955 based on his ownership of forty percent (40%) of the common capital stock of a corporation which was engaged, as a miniscule portion of its corporate business and activities, in an illegal gambling business within the meaning of Section 1955. That conclusion is compelled from a reading of the record, in that the record clearly shows that the petitioner did not perform any of the other sorts of acts denounced by Section 1955—that is, the evidence shows the petitioner did not conduct, did not finance, did not manage, did not supervise and did not direct all or part of the illegal gambling business.

Viewed in the light most favorable to the government, the evidence does not show *any* involvement or participation by the petitioner in the gambling operation.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Decided Important Questions of Federal Law in a Way in Conflict With Applicable Decisions of This Court.

The Court of Appeals for the Sixth Circuit decided important questions of federal law, that is, (i) the question of whether the petitioner actually "partici-

pated" in the illegal gambling business, (ii) the question of sufficiency of the evidence and (iii) the question of whether there was any relevant evidence as to a crucial element of the offense charged, in a way in conflict with the decisions of this court in *Sanabria* v. *United States,* 437 U. S. 54 (1978), *Jackson* v. *Virginia,* 443 U. S. 307 (1979) and *Vachon* v. *New Hampshire,* 414 U. S. 478 (1974).

As to the question of petitioner's "participation" in the illegal gambling business, the Court of Appeals appears to have concluded that petitioner's positions as president, a director and a forty percent (40%) shareholder of James Vending Corp. established his "participation" in the affairs and operation of the illegal gambling business. In so concluding, the Court of Appeals ignored the obvious — that the illegal gambling business and James Vending Corp. were not identical or co-extensive the one with the other. As this court held in *Sanabria* v. *United States,* 437 U. S., at 70:

> *It is participation in the gambling business that is a federal offense,* and it is only the gambling that must violate state law. [Emphasis supplied]

Here, the evidence, viewed in the light most favorable to the government, shows only minimal "participation" by the petitioner in the affairs of James Vending Corp., no "participation" in any of the activities carried on by James Vending Corp. as a part of the illegal gambling business and no "participation" whatsoever in the affairs of the illegal gambling busi-

ness itself. On such facts, the petitioner's conviction is no more warranted under the principle of liability announced in *Sanabria, supra,* than would be the conviction of David Rockefeller for "participation" in an unauthorized floating crap game being carried on for a period of more than thirty (30) days by five or more tellers at Chase Manhattan Bank. Viewed in the light most favorable to the government, the evidence no more shows that James Vending Corp. was an "illegal gambling business" than would evidence of the existence of a floating crap game among five or more employees of Chase Manhattan Bank show that Chase Manhattan Bank is an "illegal gambling business".

It is significant that the court did not instruct the jury that the petitioner could be convicted as a principal for the offense denounced in Title 18, United States Code, Section 1955, if he aided, abetted, counseled, commanded, procured or induced other to commit that offense, in violation of Title 18, United States Code, Section 2. The reason no such instruction was given was simply that no evidence warranted the giving of such an instruction, nor did the government request any such instruction.

The Court of Appeals likewise decided the question of insufficiency of the evidence, which was the principal assignment of error raised on appeal, in conflict with the decision of this court in *Jackson* v. *Virginia,* 443 U. S., at 319, where this court held that the standard for review for insufficiency of evidence is:

> . . . whether, after viewing the evidence in the the light most favorable to the prosecution, *any*

> rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Here, the entire record presents no evidence whatsoever that the petitioner participated in or knew about the alleged illegal gambling business.

Similarly, the Court of Appeals decided the question of whether there was any relevant evidence as to a crucial element of the offense charged in a way in conflict with the decision of this court in *Vachon* v. *New Hampshire,* 414 U.S., at 480, wherein this court held that:

> It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged violates due process.

In the present case, as in *Vachon, supra,* the conviction violates due process because it is based on a record lacking any relevant evidence as to a crucial element of the offense, namely evidence of the petitioner's "participation" in the affairs of the illegal gambling business.

2. The Decision Below Conflicts With the Decision of Another Court of Appeals as to the Proper Interpretation of Title 18, United States Code, Section 1955 and With the Decisions of Other Courts of Appeals as to the Vicarious Liability of Officers, Directors and Shareholders of Corporations for the Criminal Acts of Their Corporations.

The decision of the Court of Appeals for the Sixth Circuit is in conflict with the decision of the Court

of Appeals for the Tenth Circuit in *United States* v. *Boss*, 671 F. 2d 396 (10th Cir. 1982), wherein that court held that a showing of "actual involvement" in an illegal gambling business is required to support conviction:

> The "conduct, finance" etc. terms of the statute focus on some *actual involvement in the gambling operation*. . . . [Emphasis supplied] United *States* v. *Boss, supra*, 671 F. 2d at 400.

The order of the Court of Appeals for the Sixth Circuit affirming the petitioner's conviction directly conflicts with the decision of the Tenth Circuit in *Boss, supra*, and that conflict justifies the grant of certiorari for review the decision below.

Further, the decision in this case constitutes a clear departure from the standards for conviction under, and the interpretation of, Section 1955 by the Sixth Circuit itself, as announced in *United States* v. *Tartar*, 522 F. 2d 520, 526 (6th Cir. 1975) ["Congress imposed liability . . . on *active participants* in a 'gambling business'." (Emphasis supplied)]; *United States* v. *Leon*, 534 F. 2d 667, 677 (6th Cir. 1976) [liability under Title 18, United States Code, Section 1955 requires "*integral participation*" in the gambling business (Emphasis supplied)] and *United States* v. *Campion*, 560 F. 2d 751, 752 (6th Cir. 1977) [liability under Title 18, United States Code, Section 1955 requires proof "beyond a reasonable doubt that [the defendant] was *an integral participant* in the [gambling] business", citing *United States* v. *Leon, supra*, at p. 677; and fur-

ther imposing the requirement for liability under Section 1955 that the defendant's "involvement had a *significant or sustained impact upon the gambling enterprise.*" (Id., p. 754) (Emphasis supplied)]

Further, the decision below conflicts with the decisions of the United States Court of Appeals for the District of Columbia Circuit and of the predecessor court of the United States Court of Appeals for the Second Circuit as to vicarious liability of corporate officers, directors and shareholders for the criminal acts of their corporations. *United States* v. *Sherpix Inc.*, 512 F. 2d 1361 (D.C. Cir. 1975); *United States* v. *MacAndrews & Forbes Co.*, 149 F. 823 (C.C.A. 2nd, 1906).

In the absence of a showing of *actual participation* in illegal activities, the Courts of Appeal have repeatedly held corporate officers, directors and shareholders not criminally liable. The District of Columbia Circuit has stated the accepted rule:

> The accepted rule is that officers, directors and agents of a corporation may be held criminally liable for their acts although performed in their official capacity but *where they have neither actively participated in nor directed nor authorized a violation of law by their corporation they are not liable. United States* v. *Sherpix, Inc.*, 512 F. 2d 1361, 1372 (D.C. Cir. 1975). [Emphasis supplied]

The Second Circuit has stated the same rule as follows:

> [T]he courts have conclusively presumed that the relation between a corporation and its stockholder is not such that the latter can be held to criminal responsibility for a violation of the law in which

he is not alleged to have personally participated. *United States* v. *MacAndrews & Forbes Co.*, 149 F. 2d 823, 832 (C.C.A. 2d, 1906).

In the present case, no evidence demonstrates that the petitioner "personally participated" in or "directed" or "authorized" a violation of the law by the corporation. The Sixth Circuit's affirmance of the petitioner's conviction, based on a record lacking any evidence that petitioner actually participated in the illegal gambling activity, is in conflict with the decisions of this Court, violates due process, is in conflict with decisions from other circuits and fully justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Sixth Circuit affirming the petitioner's conviction.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 82-5135

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

LUTHER A. JAMES, - - - *Defendant-Appellant.*

ORDER—Filed November 10, 1982

BEFORE: ENGEL, MERRITT, Circuit Judges and MORTON, Chief District Court Judge*

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof, the Court finds that there is substantial evidence to support the verdict of the jury and that no prejudicial error has intervened.

Accordingly, It is ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

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*The Honorable L. Clure Morton, Chief Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 82-5135

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

LUTHER A. JAMES, - - - *Defendant-Appellant.*

ORDER—Filed January 4, 1983

Before: ENGEL and MERRITT, Circuit Judges; and MORTON, Chief District Court Judge*

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the defendant-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing en banc be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

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*The Honorable L. Clure Morton, Chief Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 82-5135

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

LUTHER A. JAMES, - - - *Defendant-Appellant.*

ORDER—Filed January 13, 1983

Upon consideration of the appellant's motion to stay the mandate pending application for writ of certiorari,

It is ORDERED that the motion be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

No. 82-1262

In the Supreme Court of the United States

OCTOBER TERM, 1982

LUTHER ALBERT JAMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether there was sufficient evidence to establish that petitioner conducted, financed, managed, supervised, directed or owned all or part of an illegal gambling business, in violation of 18 U.S.C. 1955.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rule:

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1262

LUTHER ALBERT JAMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 19) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1982, and the petition for rehearing was denied on January 4, 1983 (Pet. App. 20). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted on one count of owning an illegal gambling business, in violation of 18 U.S.C. 1955 and 2.[1] Petitioner was

[1] A second count, which charged petitioner with a violation of the Travel Act, 18 U.S.C. 1952, was dismissed by the district court.

sentenced to two years' imprisonment and fined $20,000. The court of appeals affirmed (Pet. App. 19).

The evidence at trial showed that between November 1, 1979, and May 21, 1980, an illegal gambling business involving the use of video-display poker machines was carried on in Jefferson County, Kentucky. Under the scheme, machines owned and maintained by James Vending Corporation were installed in various taverns, which made cash payoffs to winning players in lieu of merely allowing the players additional free playing time.[2] The profits from the machines were split evenly between the taverns and James Vending Corporation. (2 Tr. 219-225, 241-248, 254-257, 262-264; 3 Tr. 270-274, 283-285, 295-297, 303-308, 313-316, 319-322, 325-326.)

For his part, petitioner was the founder, president and 40% owner of James Vending Corporation (5 Tr. 636). Petitioner's wife owned an additional 35% of the corporate stock and served as the company's secretary-treasurer. Apart from petitioner and his wife, the corporation employed only 11 or 12 persons (5 Tr. 568-570).

On May 21, 1980, a number of video-display poker machines and various records of James Vending Corporation were seized pursuant to federal search warrants. Petitioner was present at three locations where the warrants were executed. At one location petitioner advised a barmaid not to say anything to the FBI agents and contested the FBI's right to seize the machines (5 Tr. 643-644). At another location petitioner identified the machines as his and indicated that he wanted to see his seized machines in

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[2]The machines were fitted with "knock-off" switches that permitted bartenders to eliminate free playing time when payoffs were made so that the machines were ready for play by a new customer. An expert witness testified that such switches are characteristic of video gambling devices (2 Tr. 115-120, 136).

order to copy numbers from them (5 Tr. 651-652). And, at the offices of the James Vending Corporation, the officer executing the warrant observed that upon his arrival petitioner examined the search warrant and took charge of the premises from the manager. Noting that only a portion of the records on the premises was covered by the search warrant, petitioner proceeded to identify those records for the agent (5 Tr. 669-670). Another officer testified that the manager would not open the safe without petitioner's express permission (5 Tr. 681-682, 684).

A minority stockholder in James Vending Corporation testified that he had seen petitioner reviewing the weekly deposits from the machines. On occasion, petitioner complained that the "take" was too small and that the machines were paying out too much (4 Tr. 530-531). That stockholder also testified that no dividends were paid on his stock and that he had never received notice of any shareholders' meetings (4 Tr. 511, 539). A bartender at one of the taverns where some of the video-display poker machines were located testified that on an occasion when a machine broke down she called petitioner, whose office was upstairs (3 Tr. 339). Finally, an employee of James Vending Corporation testified that if he received conflicting instructions from the manager and petitioner, he would follow those of petitioner (4 Tr. 552).

ARGUMENT

Petitioner concedes (Pet. 6-7) that the evidence disclosed the existence of an "illegal gambling business" (18 U.S.C. 1955) that involved five or more persons and that was in substantially continuous operation for more than thirty days. He argues, however, that the evidence was insufficient to show that he participated in the illicit business (Pet. 12-15). This fact-bound question, resolved against petitioner

by both courts below,[3] warrants no further review by this Court. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967). In any event, when the evidence is considered in the light most favorable to the government (see *Glasser* v. *United States*, 315 U.S. 60, 80 (1942)), there is no doubt but that it is sufficient to support petitioner's conviction.

As this Court has recognized, 18 U.S.C. 1955 "proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor." *Sanabria* v. *United States*, 437 U.S. 54, 70-71 n.26 (1978). The statute is designed to reach those like petitioner who "finance[], manage[], * * * or own[]" a gambling enterprise. In light of the undisputed evidence that petitioner was the principal stockholder and chief executive officer of the small, family-dominated corporation that owned, installed, maintained, and profited from the video-poker machines, there is no merit to the contention that the government's proof failed to satisfy the statutory elements.[4]

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[3]In affirming petitioner's conviction the court of appeals rejected his sufficiency claim (Pet. App. 19) and the trial judge denied his motion for acquittal (5 Tr. 780).

[4]Although petitioner distanced himself from the day-to-day operations of the gambling enterprises, his own words and conduct demonstrated his knowing participation in the scheme. Thus, petitioner reviewed weekly income reports from the video-poker machines and complained that the "take" was too small (see page 3, *supra*). Moreover, during the raids to seize the machines and corporate records, petitioner variously instructed a bar employee not to speak to FBI agents, contested the agents' right to seize the machines, negotiated with FBI agents over which records would be seized and generally took charge of the officers of James Vending Corporation (see pages 2-3, *supra*). In short, petitioner demonstrated that he was an active owner-operator of a business that illegally operated video-poker machines. No more was required to sustain his conviction under Section 1955.

Nor is there merit to petitioner's claim (Pet. 15-16) that the instant decision is in conflict with *United States* v. *Boss*, 671 F.2d 396 (10th Cir. 1982),[5] in which the court of appeals required proof of a defendant's "actual involvement in the gambling operation" through the performance of "a necessary function for the illegal gambling business" (*id.* at 400).[6] There, in the course of determining the existence of the five-person jurisdictional requirement, the court held that several barmaids, who periodically serviced the back room of a nightclub where gambling was taking place, were not

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[5]Petitioner cites (Pet. 16) a number of cases from the Sixth Circuit that he contends are in conflict with the instant case (Pet. 16-17). If such intracircuit conflict exists, it is for the court of appeals, not this Court, to resolve. Cf. *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

[6]Petitioner also asserts (Pet. 17-18) that the instant decision conflicts with *United States* v. *Sherpix, Inc.*, 512 F.2d 1361 (D.C. Cir. 1975), and *United States* v. *MacAndrews & Forbes Co.*, 149 F. 823 (C.C.S.D.N.Y. 1906), "as to vicarious liability of corporate officers, directors and shareholders for the criminal acts of their corporation." Both cases are wholly inapposite, as the statutes involved in those cases do not criminalize ownership, financing, management, supervision or direction of an illicit business, as does 18 U.S.C. 1955. In any event, as noted above, there was evidence that petitioner was personally involved in directing the gambling business, and neither of the courts below indicated that it was relying on a theory of vicarious liability.

Although it is not raised as one of the questions presented in the petition, petitioner contends (Pet. 10) that the testimony of certain officers should not have been admitted in evidence because those witnesses recited statements made by petitioner that were not produced by the government in pretrial discovery. Petitioner's claim that Rule 16(a)(1)(A), Fed. R. Crim. P., mandates that this testimony be stricken was properly rejected by the district court (6 Tr. 880, 882, 896). First, petitioner's statements were not made during official interrogation and thus are not covered by Rule 16(a)(1)(A) (see 6 Tr. 867, 876, 878). In addition, no objection was made during the officers' testimony and petitioner's motion to strike was not made until the close of the case (see 6 Tr. 863, 896). Nevertheless, in an abundance of caution, the district court permitted petitioner to reopen the evidence to rebut the officers' testimony; petitioner failed to do so.

"conductors" of an "illegal business" within the meaning of the statute (*id.* at 401-402). At the same time, however, the Tenth Circuit had no difficulty in finding that the two persons who leased the nightclub and owned the fixtures were participants within the meaning of Section 1955 (*id.* at 398, 401).

Here, unlike in *Boss*, the court was not required to determine whether a peripheral actor "conduct[ed]" an illegal gambling business within the meaning of the statute. Rather, the indictment alleged and the evidence showed that petitioner "finance[d], manage[d] * * * or own[ed]" an illegal gambling business. Such conduct lies at the very core of a gambling operation, and, indeed, we know of no case in which a court of appeals has found such participation to be outside the scope of Section 1955.

Beyond this, petitioner cites nothing to suggest that the court here could not have found that petitioner had "actual involvement" in the financing, managing, supervising, directing and owning of the illegal gambling business. As noted in the discussion above, there was certainly evidence of such participation by petitioner. Indeed, in denying the motion for a judgment of acquittal the trial court specifically took note of the facts that petitioner controlled 75% of James Vending Corporation stock, was president of the corporation and personally claimed ownership of the video-display poker machines (5 Tr. 779-780). In short, there is nothing to indicate that the court below applied a standard that conflicts with the standard applied in *Boss*, or that the Tenth Circuit would have reached a different result if it had been considering the facts presented here.[7]

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[7]Without presenting argument, petitioner also alleges (Pet. 4-5) that the court's jury instructions were defective. The first challenged instruction is taken almost verbatim from the statute, and, accordingly, is unexceptionable. The second challenged instruction (7 Tr. 980) was

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1983

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modified at petitioner's request (7 Tr. 990-991) to include the language "knowingly and intentionally" (7 Tr. 998), thus largely conforming with petitioner's requested instruction (Pet. 5). The language of petitioner's proposed instruction that would require a defendant to have made a personal and substantial contribution to the success of the gambling business is unsupported by the language of the statute or by any case law.

DOJ-1983-04